The Kulim Baling Road Transport Co Sdn Bhd & Anor v Thanimalai a/l Munian (father to Sivabalan a/l Thanimalai, deceased as defendant) & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12–76 OF 2004
ZAMANI A RAHIM JC
29 JULY 2008

Tort — Road accident — Contributory negligence — Apportionment of liability — Motorcycle collided into bus — Sessions court apportioned liability at 50:50 — Appeal against apportionment — Whether appeal should be allowed

The first and the second appellants, the registered owner of the motorbus and its driver, respectively, appealed against the decision of the learned sessions court judge who apportioned the liability equally at 50:50 in respect of a running down action. The first respondent, the father of the deceased rider of the motorcycle, and the second respondent, the pillion rider, crossed appeal against the said decision. The said accident happened at about 5.15pm at the junction of Kampung Padang Kulim. Upon arrival at the junction, the second respondent saw a stationary motorbus at a distance of 15m on the left edge of the road. The motorbus had stopped there because passengers were boarding and alighting the motorbus. The left half of the motorbus body was on the left shoulder of the road and the other half was on the road. According to second respondent, when the motorcycle was about 5m from the rear of the motorbus, the motorbus had suddenly turned or moved to the right without activating the right trafficator light. On seeing this, the first respondent had attempted to brake and avoid colliding into the motorbus but failed and thus, collided into the rear off-side red light indicator (red light indicator on the right side at the rear). At that time, it was drizzling and the traffic was heavy. The second appellant contended that the place where he had stopped the bus was a bus stop and that he had given a signal when he wanted to move to the right.

Held, dismissing the appellants' appeal and the respondents' cross-appeal with costs:

(1) The second appellant could not be completely absolved from liability. He was partly to be responsible for the accident. If the second appellant intended to move to the right, after having stopped at the left edge of

the road, the second appellant must have ensured that it was safe to do so. Although the second appellant said that he gave the signal to turn right, no mention of this was made in his police report. Further, merely giving the signal was not sufficient. More so, the second appellant was driving a public transport vehicle where public safety was of utmost importance (see paras 10 & 11).

(2) The learned sessions court judge had accepted the evidence of the second respondent that the motorbus had made a sudden turn to the right. This was a question of fact based on the credibility of the second respondent. The trial judge, having considered the evidence as a whole, had acted on the second appellant's evidence. This court must be slow to interfere with an observation on the credibility of a witness which this court does not have the advantage of seeing and hearing them (see para 11).

(3) The first respondent was equally to be blamed for the accident. He was partly the author of his death. The first respondent should have a proper lookout for vehicles travelling in front having regard to the traffic which was heavy at that time and the fact that it was drizzling. If the first appellant made a sudden turn to the right, there was no reason for the first respondent to make a similar turn to the right. The first respondent should have maintained his motorcycle on the left side of the road and reduced the speed when he saw that passengers were boarding and alighting the motorbus. The fact that he had no sufficient time to avoid the motorbus showed that he was travelling quite close to the rear of the motorbus (see paras 12 & 13).

[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua, masing-masing pemilik berdaftar bas dan pemandunya, merayu terhadap keputusan hakim mahkamah sesyen yang bijaksana yang mengagihkan liabiliti secara sama rata pada 50:50 berkaitan dengan tindakan kemalangan jalan raya. Responden pertama, bapa kepada penunggang motosikal yang mati, dan responden kedua, pemboncengnya, membuat rayuan balas terhadap keputusan tersebut. Kemalangan tersebut berlaku pada kira-kira pukul 5.15 petang di persimpangan Kampung Padang Kulim. Apabila tiba di persimpangan tersebut, responden kedua melihat sebuah bas yang berhenti pada jarak 15m pada hujung sebelan kiri jalan tersebut. Bas tersebut berhenti di situ kerana penumpang-penumpangnya sedan naik dan turun dari bas tersebut. Separuh daripada bahagian kiri badan bas tersebut terletak di bahagian kiri bahu jalan dan separuh lagi di atas jalan. Menurut responden kedua, apabila motosikal tersebut berada kira-kira 5m daripada bahagian belakang bas, bas tersebut tiba-tiba membelok atau bergerak ke arah kanan tanpa menyalakan lampu penunjuk kanannya.

A Melihat perkara ini, responden pertama mencuba untuk membrek dan mengelak daripada melanggar bas tersebut tetapi gagal dan oleh itu, melanggar bahagian belakang berdekatan dengan lampu penunjuk merah (lampu penunjuk merah di bahagian sebelah di belakang). Pada ketika itu, hujan renyai-renyai dan keadaan jalan sesak. Perayu kedua menghujah
B bahawa tempat di mana dia memberhentikan bas adalah perhentian bas dan dia telah memberikan isyarat apabila dia hendak bergerak ke arah kanan.

C **Diputuskan**, menolak rayuan perayu-perayu dan rayuan balas responden-responden dengan kos:

(1) Perayu kedua tidak boleh dibebaskan secara keseluruhan daripada liabiliti. Dia adalah bertanggungjawab sebahagian terhadap kemalangan tersebut. Jika perayu kedua berniat untuk bergerak ke arah kanan,
D selepat berhenti di bahu kanan jalan, perayu kedua patut memastikan bahawa ia selamat untuk berbuat demikian. Walaupun perayu kedua menyatakan bahawa dia memberikan isyarat untuk membelok ke kanan, tidak ada apa-apa disebut mengenainya di dalam laporan polisnya. Selanjutnya, memberi isyarat semata-mata tidak mencukupi.
E Lebih-lebih lagi, perayu kedua sedang memandu kenderaan awan di mana keselamatan awam adalah yang paling penting (lihat perenggan 10 & 11).

(2) Hakim mahkamah sesyen yang bijaksana telah menerima keterangan
F responden kedua bahawa bas tersebut telah membelok secara tiba-tiba ke arah kanan. Ini adalah persoalan fakta berdasarkan kredibiliti responden kedua. Hakim bicara, selepas mempertimbangkan keterangan secara keseluruhannya, telah bertindak ke atas keterangan perayu kedua. Mahkamah ini sepatutnya tidak campur tangan dengan
G pemerhatian terhadap kredibiliti saksi yang mahkamah ini tidak mempunyai kesempatan untuk melihat dan mendengarnya (lihat perenggan 11).

(3) Responden pertama sepatutnya sama-sama dipersalahkan untuk kemalangan tersebut. Dia merupakan sebahagian daripada penyebab
H kematiannya. Responden pertama sepatutnya lebih berhati-hati terhadap kenderaan-kenderaan yang berjalan di hadapan memandangkan jalan yang sesak pada ketika itu dan fakta bahawa hujan turun renyai-renyai. Jika perayu pertama membelok secara tiba-tiba ke arah kanan, tidak ada sebab untuk responden pertama
I membuat belokan yang serupa ke arah kanan. Responden pertama sepatutnya mengekalkan motosikalnya di arah kiri jalan dan mengurangkan kelajuannya apabila dia melihat penumpang-penumpang naik dan turun dari bas. Fakta bahawa dia tidak mempunyai masa yang cukup untuk mengelak bas tersebut

menunjukkan bahawa dia menunggang terlalu hampir dengan bahagian belakang bas tersebut (lihat perenggan 12 & 13).]

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed 2005 Reissue) paras 1664–1665.

Cases referred to

Dewaramah Ellapin v Ibrahim Abdul Hamid & Anor [1989] 1 CLJ 18, HC (folld)
Norata Singh v Serdara Singh [1967] 1 MLJ 265, FC (refd)
Ong Kim Hai v Kusaini bin Surip [1984] 2 MLJ 285, FC (folld)
Tabarani Mohd Arshad & Anor v Chan Tenn Yeu [1999] MLJU 126; [1999] 3 CLJ 188 (folld)

Sunitha Kaur Sandhu (Ajmer Sandhu & Ong) for the appellants/plaintiffs.
Balabedha Ramaloo (Balabedha & Co) for the respondents/defendants.

Zamani A Rahim JC:

[1] This is an appeal by a registered owner of motorbus No KY 4533, the first appellant and his driver, the second appellant, who were dissatisfied with the decision of the learned sessions court judge who apportioned the liability equally at 50:50 in respect of a running down action.

[2] The appeal by the appellants were against liability only.

[3] There was a cross-appeal vide Civil Appeal No 12—77 of 2004 by the estate of the deceased, the rider of motorcycle PDP 9021, the first respondent and the pillion rider, the second respondent. I have dismissed the cross-appeal with costs. There is no further appeal by the estate of the first respondent and the second respondent.

[4] In the present appeal by the first appellant and second appellant, I too dismissed their appeal and confirmed the decision of the learned sessions court judge.

[5] The accident happened at Jalan Kulim–Serdang at the junction of Kampung Padang Kulim on 17 February 1999 at about 5.15pm. The first respondent was riding motorcycle PDP 9021 from Taman Emas towards Simpang Tiga Lampu Isyarat, Jalan Sungai Ular Hai-Tech, Kulim (see the sketch plan).

[6] Upon arrival at the scene of the accident, the second respondent saw a stationary motorbus at a distance of 15m on the left edge of the road. The left half of the motorbus body was on the left shoulder of the road and the other half was on the road. The head of motorbus was facing Simpang Tiga Lampu Isyarat, Jalan Sungai Ular Hai-Tech, Kulim. When the motorcycle, PDP 9021 in which the second respondent was riding pillion was about 5m from the rear of the motorbus, suddenly the motorbus turned or moved to the right without activating right trafficator light. On seeing this, the first respondent became panic. The first respondent attempted to brake and avoided to the right. His evasive action failed. He collided into the rear off-side red light indicator (red light indicator on the right side at the rear).

[7] At that time, it was drizzling. The traffic was heavy. The first respondent was riding the motorcycle about 3–4 feet away from the left edge of the road at a speed approximately 40–50kmj.

[8] The second appellant said that the motorbus stopped there because there were passengers getting down and getting up the motorbus. He claimed that the place he stopped was a bus stop, though the investigating officer said it was not. There were other buses there. There were continous double white line in the middle of the road. Further the second appellant said that after the passengers got into his motorbus, he heard a certain sound came from the rear of his motorbus. He got down and proceeded to the rear of his motorbus. There, the second appellant saw a motorcycle fallen underneath the motorbus at the rear.

[9] The second appellant gave the impression that he gave a signal when he wanted to move to the right. In cross-examination (at pp 44 and 45 of the appeal record), the second appellant evidence went like this:

> Katakan Encik tidak pasang lampu signal bila nak masuk naik ke jalan.
>
> -Tak setuju.
>
> Encik tak nyata dalam laporan telah pasang signal?
>
> -Polis tak tanya saya.

[10] From the available evidence, both oral and mute, the second appellant cannot completely be absolved from liability. He is partly to be responsible for the accident. If the second appellant intended to move onto the right, after having stopped at the left edge of the road, the second appellant must ensure it was safe to do so. Though the second appellant said that he gave the signal to turn right, no mention was made in his police report.

[11] By merely giving the signal, it is not sufficient. More so the second

appellant was driving a public transport where public safety was utmost importance. The road was busy. There was no evidence from the second appellant whether he had seen the first respondent on his motorcycle coming from the rear before the accident. The appellant's counsel argued that the failure by the second appellant to ascertain the presence of the first respondent at the rear was a non-issue as the motorbus was stationary in a straight position. The second appellant had made no attempt to move to the right. In this aspect of the evidence, it would appear that the learned sessions court judge had accepted the evidence of the second respondent that the motorbus had made a sudden turn to the right. This is a question of fact and credibility of the second respondent. The learned session court judge, having considered the evidence as a whole, had acted on the second appellant's evidence. This court, as an appellate court, must be slow to interfere with an observation on credibility of a witness which this court does not have the advantage of seeing and hearing them: see *Norata Singh v Serdara Singh* [1967] 1 MLJ 265.

[12] Be that as it may, the first respondent is equally to be blamed for the accident. He was partly the author of his death. The first respondent should have a proper look out for vehicles travelling in front having regard to the traffic which was heavy at that time and it was drizzling too.

[13] If the first appellant made a sudden turn to the right, there is no reason for the first respondent to make a similar turn to the right. The first respondent should have maintained on the left side of the road, reduced the speed when he saw the public transport was loading and unloading passengers. The fact that he had no sufficient time to avoid the motorbus showed that he was travelling quite closed to the rear of the motorbus.

[14] There are a number of past decisions relating to collision from the rear. Their facts of how the accident happened are not exactly the same with the facts in this case. But these cases may be referred to as guidance to assist in the determination of liability, whether a 100% negligence or there is contributory negligence. In *Dewaramah Ellapin v Ibrahim Abdul Hamid and Anor* [1989] 1 CLJ 18, the plaintiff filed the action for the benefit of the estate of the deceased, the rider of a motorcycle. The deceased rider collided into a motor lorry driven the first defendant. The plaintiff alleged that the accident was caused solely by the negligence of the first defendant. The most serious particulars of negligence was that the first defendant made a sudden turn to his right without giving any warning despite the fact that the deceased rider had given warning of his intention to overtake the motor lorry, driven by the first defendant.

[15] The crux of the defence was that the deceased rider was riding his motorcycle too close to the said motor lorry and that he had failed to take heed of the signal given by the first defendant which was indicative of his intention to turn to the right.

[16] It was held as follows:

(1) The deceased rider was totally at fault as it was due to his negligence that the accident occurred;

(2) The court cannot find anything to fault the first defendant as he had done all he could and had observed the essential rule of the road; and

(3) In the circumstances, the plaintiff's claim was dismissed with costs.

[17] In *Tabarani Mohd Arshad & Anor v Chan Tenn Yeu* [1999] MLJU 126; [1999] 3 CLJ 188, an accident occurred between the motorcyclist, ridden by the respondent and motor lorry, driven by the first appellant. The version of the first appellant went like this. He gave light signals five street light away before turning to the right. He looked to the side mirror and found that there was no vehicle behind him and he then turned to the right. While he was negotiating the turning to the right intending to enter the side road, the motorcycle ridden by the respondent came from the rear and collided into the front right tyre of the motor lorry.

[18] On appeal the liability was apportioned as follows. The first appellant was 25% liable while the respondent was 75% liable.

[19] In the Federal Court case of *Ong Kim Hai v Kusaini bin Surip* [1984] 2 MLJ 285, an accident occurred between two motorcycles near a junction at the 18th milestone Kuala Lumpur/Rawang main road. The two motorcycles were travelling in the same direction, that is, from Kuala Lumpur towards Rawang. The respondent travelling behind the appellant.

[20] At the trial in the court below, the respondent alleged that the appellant suddenly swerved to the right. The trial judge held that the appellant was wholly to blame for the accident and absolved the respondent from any blame whatsoever and accordingly dismissed the action with costs.

[21] In setting aside the finding of 100% liability on the part of the appellant by the trial judge, the Federal Court said the respondent could not be wholly absolved from blame but must took a certain share of the blame and in the circumtances the blame should be apportioned 75% as the appellant's share and 25% as the respondent's share.

[22] Guided by the aforementioned cases, there can be no 100% liability on either side, except the case of *Dewaramah a/p Ellapin*. Invariably the liability will be apportioned between the parties. There is no suggestion by the appellant's counsel on the apportionment of liability, let alone its proportion. The learned sessions court judge found both the first appellant and the first respondent were equally to be blamed for the collision. The liability was at 50:50.

[23] Having regard to the circumstances of the accident in this case, I, hereby, confirmed the decision of the learned sessions court judge that the liability of the parties be apportioned equally, that is 50:50.

Appellants' appeal dismissed and respondents' cross-appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed